Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-1209

In the

Supreme Court of the United States

OCTOBER TERM, 1976

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

JOE STEWART, ROY TOLBERT, JO ANN KELSEY, ISAIAH HATCHER, and ARTIS OSBORNE For Themselves and For All Other Persons Similarly Situated,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Seventh Circuit

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Petitioner respectfully moves that this Court (1) vacate its denial of the Petition for Writ of Certiorari entered on June 29, 1977, (2) grant the Petition, and (3) remand the case to the Court of Appeals for reconsideration in light of *Hazelwood School District* v. *United States,* No. 76-225 (6/27/77); *Teamsters* v. *United States,* No. 75-636 (5/31/77); and *United Air Lines, Inc.* v. *Evans,* No. 76-333 (5/31/77), or, in the alternative, accept the case for full review.

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, in which the Court of Appeals affirmed a finding that Petitioner discriminated against a class of black hourly rated employees in promotions. The decisions in *Hazelwood School District, Teamsters,* and *United Air Lines* were rendered after the decision by the Court of Appeals and the filing of the Petition for Certiorari herein. These decisions are intervening circumstances of substantial and controlling effect which were not previously presented to this Court by Petitioner.

This Court issued its decision in *Hazelwood School District* only two days before the Petition for Certiorari herein was denied. That case was remanded because the "Court of Appeals totally disregarded the possibility that [the] prima facie statistical proof in the record might at the trial level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII [on March 24, 1972]." Slip Opinion at p. 9. As this Court noted, "once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show 'that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination.'" *Id.* at p. 10.

In this case, the Court of Appeals found a prima facie case of discrimination in the promotion of black hourly employees to salaried positions based on a statistical disparity between the percentage of blacks in salaried positions (9%) as compared to the percentage of whites in salaried positions (21%). The first ground for error cited by Petitioner in its Petition for Certiorari was that the Court of Appeals disregarded undisputed evidence that the *rate of promotion* of blacks to the higher rated positions *exceeded* the ratio of blacks in the work force during the period at issue. See, Pet. For Cert. 13-18.

The period at issue in this case is 1969 to the date of trial because (1) the plaintiffs' complaint was limited to a claim of discrimination based on acts of alleged discrimination occurring since 1969 (see, Pet. For Cert., p. 4),[1] and (2) the applicable limitation periods under Title VII and 42 U.S.C. §1981 preclude a claim of discrimination prior to 1969. See, Pet. For Cert., pp. 19-20. That 1969 is the applicable cut-off date in this action is confirmed by this Court's holding in *United Air Lines, Inc.* v. *Evans,* No. 76-333, that "a discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." Slip Opinion at p. 5.[2]

In response to the work force statistics relied upon by plaintiffs, it was established without dispute that since January 1, 1969 *all five* hourly employees promoted from hourly positions to salaried positions *were black class members.* Even taking account of outside hires, the rate of placement of blacks in salaried vacancies for which class members might possibly have been qualified was:

> 1/1/69 to 8/31/73 (the date suit was filed) —6 blacks out of 14 vacancies or 42.8%.
>
> 1/1/69 to 5/27/75 (the date of trial) — 9 blacks out of 19 vacancies or 47.4%.

Throughout the period from January 1, 1969 to the date of trial, blacks averaged approximately 25% of the hourly work force. See, Pet. For Cert., p. 5; Add. A.

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[1] Because the plaintiffs' complaint was limited to post-1969 discrimination, unlike *Hazelwood,* there was no evidence presented and no specific finding with respect to pre-1969 discrimination. *Id.*

[2] See also, *Teamsters* v. *United States,* No. 75-636. Slip Opinion, p. 21, n. 30.

Under the authority of *Hazelwood School District*, therefore, the District Court and the Court of Appeals should have examined the statistics on the rate of promotion of blacks since 1969 because those statistics show that the prima facie case "established by statistical work force disparities" was rebutted by undisputed evidence that the "claimed discriminatory pattern" could only have been the product of pre-1969 events, rather than unlawful discrimination. See, Pet. For Cert., pp. 13-18. Accordingly, Petitioner respectfully submits that *Hazelwood* is controlling authority with respect to the matters at issue in this case. At the minimum, a remand of this case is necessary with directions to the Court of Appeals to consider the impact of the statistics on the rate of promotions during the relevant period.

Indeed, it is submitted that the evidence in this case provides an even stronger basis for reconsideration than in *Hazelwood* because the work force statistical disparities were the only evidence of discrimination cited by the Court of Appeals.[3] Unlike *Hazelwood*:

(1) None of the individual plaintiffs proved discrimination. As the District Court found, the individual plaintiffs "failed to indicate that they were more qualified than the individuals actually advanced during this period." See, Pet. For Cert., pp. 5, 20-21.

[3] Although the Court of Appeals purported to support its decision by finding that defendant's promotional policies were "highly subjective and loosely structured" and, therefore, "susceptible to abuse," even if true, which Petitioner denies, subjective and loosely structured procedures are not inherently discriminatory. Promotional policies are only unlawful if they result in disparite treatment, but here the undisputed statistics on the rate of black advancement show that the policies, no matter how characterized, benefitted blacks. See, Pet. For Cert., pp. 5-6 n. 6.

(2) No evidence was offered that any other member of the class of black hourly employees was qualified for, but denied placement in any salaried vacancy which had been filled by a white. *Id.*

(3) The District Court and Court of Appeals ignored detailed and undisputed rebuttal evidence on the manner in which *each vacancy* was filled during the period Petitioner was charged with discrimination. That evidence established that each vacancy not filled by a black was filled only after affirmative efforts to seek out qualified blacks failed to locate a black with qualifications equal to or greater than those of competing whites. See, Pet. For Cert., pp. 5-7, 21-23; Add. B.

In *Teamsters* v. *United States*, No. 75-636 (5/31/77), this Court stated that it is the plaintiff's burden to "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." Slip Opinion at 10. With respect to statistics, this Court cautioned (Slip Opinion at 14):

> "We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."

As the foregoing shows, the District Court and the Court of Appeals not only erred in failing to consider the rebuttal statistics, but also erred in ignoring other relevant facts, circumstances, and rebuttal evidence which clearly refute any finding that racial discrimination was Petitioner's "standard operating procedure."

CONCLUSION

Based on the foregoing and the grounds stated in the Petition for Writ of Certiorari, Petitioner respectfully requests that the Order denying said Petition be reconsidered and that this case be remanded for consideration of Petitioner's statistical and other rebuttal evidence in light of this Court's decisions in *Hazelwood School District* v. *United States,* No. 76-255; *Teamsters* v. *United States,* No. 75-636; and *United Air Lines, Inc.* v. *Evans,* No. 76-333 or, in the alternative, that this case be accepted for full review by this Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Michael A. Warner, having been first duly sworn on oath, deposes and states as follows:

1. I am one of the attorneys for Petitioner General Motors Corporation. This Certificate is filed pursuant to Rule 58(a) of the Rules for the Supreme Court of the United States in support of Petitioner's Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

2. This Petition is filed in good faith and not for purposes of delay. In this regard, it is noted that the Decree entered in this matter has not been stayed pending action on the Petition for Writ of Certiorari.

3. The grounds stated in the Petition are limited to intervening circumstances—specifically, the controlling or substantial effect of this Court's recent decisions in *Hazelwood School District* v. *United States,* No. 76-255 (6/27/77); *Teamsters* v. *United States,* No. 75-636 (5/31/77); and *United Air Lines* v. *Evans,* No. 76-333 (5/31/77), all of which were decided subsequent to the filing of the Petition for Writ of Certiorari herein.

/s/ Michael A. Warner
Michael A. Warner
One of the Attorneys for Petitioner, General Motors Corporation

Subscribed and Sworn to
before me this 19th day
of July, 1977.

/s/ Mary Lou Ryan
Notary Public